

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1396

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1396

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE VAVOLIZZA,

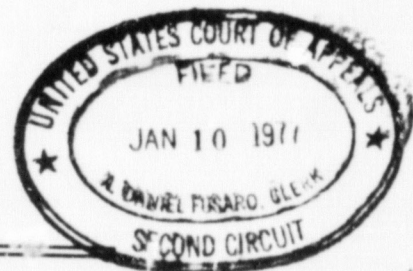
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

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*Assistant United States Attorneys,
Of Counsel.*



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United States of America
v.
Salvatore Vavolizza, et al

63 Cr 190

New York, October 14, 1968
10:30 a.m.

- - -

Present:

Mr. Kaplan

Mr. Krieger

Mr. Coiro

- - -

(In the robing room:)

MR. KRIEGER: If your Honor please,
I take this opportunity of advising you that it is
the intent of the defendants Bibano and Vavolizza,
subject to the permission of the Court, to enter
a plea of guilty to Count 1, the conspiracy count
set forth in the indictment, and to Count 10,
a substantive count set forth in said indictment.

I have explained to my clients the
force and effects of said plea and any time it
would suit the Court's convenience, I would make
an application to withdraw the plea of not guilty
heretofore entered to the indictment and offer
to plead guilty to those specific counts.

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THE COURT: Is that agreeable with the government?

MR. KAPLAN: That disposition would be agreeable to the government, your Honor.

THE COURT: And the other counts would remain open, I take it, until the day of sentence?

MR. KAPLAN: Yes, sir.

MR. KRIEGER: At which time I will make an application for dismissal and your Honor would rule on it as he sees fit.

THE COURT: Now, I assume I will have to take care of this with the jury and explain the fact that these people pleading guilty is no evidence of guilt so far as other defendants are concerned. I think I better do it now.

MR. KRIEGER: If your Honor please, my thought would be, and admittedly this would be favorable to Quaratarolo, that rather than have the Court inform the jury the two defendants have interposed a plea of guilty, just that the two defendants are no longer on trial here and the jury is to give it no consideration whatsoever.

MR. KAPLAN: The jury will, of course, notice that the two are no longer there and they are

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bound to wonder and speculate and I think the practice has pretty much uniformly been they are told they pleaded guilty but are instructed, in no uncertain terms, that that is no reflection on the guilt or innocence of the others.

THE COURT: Yes, that is what I have done in the past, and even where the pleas have been entered not during the trial but before the trial, where only certain named defendants are tried -- I think that is the only way to do it. Before I do it, we better have them plead in open court and then we will call the jury in at that point.

MR. KRIEGER: May my exception be noted, just for purposes of the record, as to the jury being informed?

THE COURT: Yes. I think it is better all around to have it right out in the open, because they are going to know it eventually and you are just going to have a lot of speculation if you don't do it now.

MR. KRIEGER: I will be slightly loquacious in connection with the offer of the plea of guilty so that my clients full well understand and there won't be any question of lack of understanding.

THE COURT: Fine.

(In open court. Jury not present.)

MR. KRIEGER: May I have your Honor's indulgence for a second?

THE COURT: Yes.

(Pause.)

MR. KRIEGER: May it please this Honorable Court, at this time on behalf of the defendants Salvatore Vavolizza and Martin Birbano I respectfully beg leave of the Court for permission to withdraw the plea of not guilty heretofore jointly and severally entered by each of the aforesaid defendants to all counts of the indictment and each of the defendants Salvatore Vavolizza and Martin Birbano request permission to enter a plea of guilty to Counts 1 and 10 of the instant indictment.

Mr. Birbano, Mr. Vavolizza, would you please stand up.

I have asked the Court for permission to withdraw your pleas of not guilty to this indictment and have requested that the Court accept pleas of guilty to the 1st and 10th counts of this indictment. Is that your wish, each of you?

DEFENDANT BIRBANO: Yes.

DEFENDANT VAVOLIZZA: Yes.

THE COURT: The clerk will read
Counts 1 and 10 to each defendant.

THE CLERK: Defendant Mr. Salvatore
Vavolizza and defendant Mr. Martin Birbano, you have
your attorney with you and you withdraw your plea of
not guilty and enter a plea of guilty as charged in
this indictment. The grand jury indictment was
filed on February 26, 1963: "From on or about
December 1, 1954, up to and including the date
of the filing of this indictment, in the Southern
District of New York and elsewhere, Salvatore
Vavolizza and Martin Birbano, the defendants herein,
unlawfully, wilfully and knowingly did combine,
conspire, confederate and agree together and with
each other and with various other persons unknown to
the grand jury, to commit offenses against the
United States, to wit, to violate Title 18, United
States Code, Section 1001, and to defraud the
United States in the exercise of its governmental
function of administering the immigration laws,
and of its right to have the business and affairs
of the Immigration and Naturalization Service, United
States Department of Justice, conducted honestly
and free from fraud, deceit, misrepresentation,

interference and obstruction.

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"It was part of said conspiracy that the defendants Salvatore Vavolizza and Martin Birbano in matters within the jurisdiction of a department and agency of the United States, to wit, the United States Department of Justice, Immigration and Naturalization Service, would and did unlawfully, wilfully, and knowingly make and cause to be made false, fictitious and fraudulent statements and representations in first preference quota immigrant visa petitions and supporting documents to the petitions.

"It was a further part of said conspiracy that the defendants Salvatore Vavolizza and Martin Birbano would and did arrange for the petitions and supporting documents containing false, fictitious and fraudulent statements and representations to be filed with the United States Immigration and Naturalization Service for the purpose of inducing the United States Immigration and Naturalization Service to approve the said petitions, thereby enabling aliens to obtain classification as first preference quota immigrants for permanent residence in the United States, to which they were not entitled.

"Among the means by which the defendants

would and did carry out the aforesaid conspiracy.
were the following:

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be made writings on the stationery of petitioners, which writings contained false, fictitious and fraudulent statements concerning the nature of the petitioner's business, the average number of petitioner's employees, the average net annual income of the petitioner, the description of the prospective work of the alien beneficiary, the reasons why the services of the alien beneficiary are urgently needed in the United States, how the alien's services will be substantially beneficial to the national economy, cultural interests or welfare of the United States.

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be made writings, for the purpose of obtaining clearance orders from the United States Employment Service, which writings contained false, fictitious and fraudulent statements as set forth in subparagraph (a) above.

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be

made first preference petitions, containing false, fictitious and fraudulent statements of the same nature and description as set forth in subparagraph (a) above.

"The defendants Salvatore Vavolizza and Martin Birbano would and did file and cause to be filed with the United States Department of Justice, Immigration and Naturalization Service, the petitions, statements in support thereof and the United States Employment Service clearance orders, hereinabove referred to in subparagraphs (a), (b) and (c), in the names of the petitioners.

"Overt acts.

"In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, the defendants committed the following overt acts, among others:

"On or about February 1, 1957, the defendants Salvatore Vavolizza and Martin Birbano had a conversation with Anthony Fasciglione at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 1, 1958, the defendant Martin Birbano had a conversation with

Philip Nisi at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

On or about March 5, 1958, the defendant
Martin Birbano received a petition signed by
Mary DiBenedetto, at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

"On or about December 1, 1958, the
defendant Martin Birbano had a conversation with
Joseph Lombardo at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

"On or about January 2, 1958, the
defendant Louis P. Bambace had a conversation with
Angelina Celina at the Bambace Travel Agency, 94 Hamilton
Avenue, White Plains, New York.

"On or about April 30, 1960, the
defendant Louis P. Bambace had a conversation
with Rocco Cipriano and Gaetano Forgione at
the Bambace Travel Agency, 94 Hamilton Avenue,
White Plains, New York.

"On or about April 11, 1959 the
defendant Domenico Quartarolo had a conversation
with Raffaele Parrella at the Salvatore Vavolizza
Travel Service, 3533 White Plains Road, New York,
New York.

"On or about April 11, 1959, the defendants Martin Birbano and Salvatore Vavolizza received from Raffaele Parrella the sum of \$50 at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 16, 1959, the defendant Domenico Quartarolo received from John Maura three letterheads of Peters Shell Service, 260 Plandome Road, Manhasset, New York, at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 16, 1959, the defendants Domenico Quartarolo and Salvatore Vavolizza received from John Maura the sum of \$50 at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about June 10, 1960, the defendant Martin Birbano had a conversation with Ernest Troiano at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about August 18, 1960, the defendant Salvatore Vavolizza filed a petition and supporting documents in the name of Craft Construction Co. with the United States Immigration and

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Naturalization Service at New York, New York.

"On or about July 7, 1960, the defendant Martin Birbano received at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York, a visa petition and two letters on the stationery of the Grenada Furniture Co., all signed by Mario Macaluso.

"On or about April 1, 1960, the defendant Martin Birbano received at the Salvatore VAVolizza Travel Service, 3533 White Plains Road, New York, New York, a blank visa petition form, I-130, and some blank letterhead stationery of Michael Bello Nurseries, Brooklyn, New York, all signed by Oliver Bello.

3 "On or about April 1, 1960, the defendant Martin Birbano, at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York, filled in the visa petition form I-130 and composed two letters on the stationery of Michael Bello Nurseries which had been previously signed in blank by Oliver Bello.

"On or about March 30, 1956, the defendants Salvatore Vavolizza and Martin Birbano had a conversation with Rosina and Frank Manata at the Salvatore Vavolizza Travel Service,

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3533 White Plains Road, New York, New York."

Count 10 is a supporting statement,
October 28, 1959 -- supporting statement to a visa
petition:

"G. DiBenedetto is in urgent need for
the services of Carmela Nicita as a Tailor I
(examiner). G. DiBenedetto did not have urgent need
for the services of Carmela Nicita as a Tailor I
(examiner). Would have used her only as a sewing
machine operator."

Counts 2 through 16: "The grand jury
further charges that on or about the dates hereinafter
set forth, in the Southern District of New York,
Martin Birbano and Salvatore Vavolizza, defendants in
a matter within the jurisdiction of a department
and agency of the United States, to wit, the Department
of Justice, Immigration and Naturalization Service,
unlawfully, wilfully and knowingly did make and cause
to be made a false, fictitious and fraudulent statement
and representation as hereinafter specified, whereas
in truth and in fact, as the defendants then and
there well knew, the specified statement was not
true as hereinafter specified.

"The allegations contained in

paragraph 1 are alleged and realleged in Counts 2 through 16 ,as if fully set forth therein."

THE COURT: Mr. Vavolizza, did you hear the charges read to you by the Clerk?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT. Do you understand the charges that were read to you?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: I take it that you have conferred with Mr. Krieger and you have given him all the facts as you know them with respect to the charges that were read; is that correct?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: And after having discussed the matter with him, do you feel that he is familiar with this case and in a position to advise you as to your plea?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: So you say that as to those charges that were read to you you are guilty and you did commit the acts that were charged against you in those counts; is that correct?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: Has anybody threatened

or coerced you in any way to get you to enter a plea of guilty to these counts?

DEFENDANT VAVOLIZZA: No.

THE COURT: You are pleading, then, voluntarily and with an understanding of the nature of the charges made against you; is that so?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: Did anybody make any representation to you or promise as to any sentence that might be imposed by the Court if you would plead guilty?

DEFENDANT VAVOLIZZA: No.

THE COURT: You understand, of course, that the other counts will remain open until the date set for sentencing and that on acceptance of your plea of guilty all that remains for the Court to do is impose sentence on the date set for that purpose? Do you recognize that fact?

MR. VAVOLIZZA: Yes, sir.

(Mr. Direnzo entered the courtroom at this point.)

THE COURT: You recognize the fact also that these particular counts, as I understand it, have a maximum sentence which could be imposed

of up to five years and, I think, a \$10,000 fine?

Is that correct, Mr. Kaplan?

MR. KAPLAN: That is correct, your Honor, on each.

THE COURT: Well, from the testimony that has been received to date on these particular counts, the Court is satisfied that the defendant Vavolizza is guilty of those charges and accordingly accepts the guilty plea.

You don't need to stand any further, Mr. Vavolizza. You may sit down.

Mr. Birbano, you heard the charges read by the Clerk?

DEFENDANT BIRBANO: Yes, sir.

THE COURT: And you understand those charges?

DEFENDANT BIRBANO: Yes.

THE COURT: And you also have conferred with Mr. Krieger and given him all the facts relating to these charges?

DEFENDANT BIRBANO: Yes.

THE COURT: And you are satisfied that he knows what the facts are?

DEFENDANT BIRBANO: Yes.

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THE COURT: And can advise you with respect to your plea.

Did anybody threaten you in any respect?

DEFENDANT BIRBANO: No.

THE COURT: Or coerce you in any way to get you to enter a guilty plea?

DEFENDANT BIRBANO: No.

THE COURT: Did anybody make any representations to you as to what sentence might be imposed if you were to plead guilty?

DEFENDANT BIRBANO: No.

THE COURT: So that you are pleading guilty as to these two counts freely and voluntarily, understanding the nature of the charges?

DEFENDANT BIRBANO: Yes, sir.

THE COURT: And for no other reason?

DEFENDANT BIRBANO: No, sir.

THE COURT: You realize that the remaining counts will remain open until the date of sentence, at which time appropriate motion will be entertained by the Court?

DEFENDANT BIRBANO: Yes.

THE COURT: You also recognize that with acceptance of the plea of guilty, all that remains

is for the Court to impose sentence and that that sentence, just indicated in the case of Mr. Vavolizza, is a maximum which could be imposed as to each count of five years and a \$10,000 fine? You recognize that?

DEFENDANT BIRBANO: Yes.

THE COURT: Very well, the Court will accept the plea of guilty as to Counts 1 and 10 by Salvatore Vavolizza and the same plea by Martin Birbano.

MR. KRIEGER: Thank you. May I state for the record that I have advised each and both of my clients that there is no appeal from the entry of the plea of guilty as to which each has entered a plea of guilty this morning.

THE COURT: As to Mr. Birbano as well as to Mr. Vavolizza, from the testimony I have heard I am satisfied of the guilt of the defendants within the meaning of the statute.

MR. KRIEGER: Yes, sir. Would your Honor entertain a request to have a pre-sentence report?

THE COURT: Yes.

MR. KAPLAN: As far as the date of sentence is concerned, your Honor, I would suggest

that we defer that until the conclusion of the trial so that in the event that the other two defendants are found guilty, all four may be sentenced on the same day.

THE COURT: That is all right with me. The defendants will be continued on their present bail.

MR. KAPLAN: The government has no objection to that. In the case of Mr. Vavolizza, it is \$2,000, and in the case of Mr. Birbano, I believe it is also \$2,000.

THE COURT: They are continued on that same bail.

MR. KAPLAN: The open counts, may they be carried until the date of sentence?

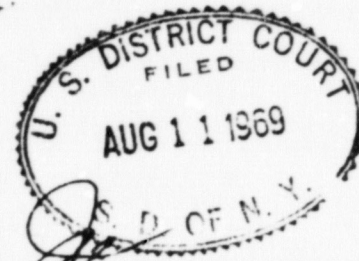
THE COURT: Yes.

MR. DIRENZO: Are you all through, Mr. Krieger?

MR. KRIEGER: Yes, sir.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA

vs.

63 Cr. 190

SALVATORE VAVOLIZZA and
MARTIN BIRBANO,
Defendant.

----- x

Before:

HON. CHARLES H. TENNEY,
District Judge.

New York, N. Y.,
February 7, 1969.

APPEARANCES:

ROBERT M. MORGENTHAU, ESQ.,
United States Attorney,
For the Government;
JACK KAPLAN, ESQ.,
Assistant United States
Attorney, of counsel.

OTTO F. FUSCO, ESQ.,
Attorney for Defendant Birbano.

SEVERIO MUCHIO, ESQ.,
Attorney for Defendant Vavolizza.

MR. KAPLAN: If your Honor pleases, with respect to the representation of Mr. Vavolizza and Mr. Birbano, they were both represented at the trial and at the time of plea by Mr. Theodore Krieger.

With respect to Mr. Vavolizza, I understand that a notice of substitution of counsel has been filed by Mr. Vavolizza and Mr. Muchio, but I would inquire through the Court whether Mr. Vavolizza does wish to be represented now by Mr. Muchio so that there is no doubt.

THE COURT: That is your wish, is it, Mr. Vavolizza?

DEFENDANT VAVOLIZZA: Yes, sir.

MR. KAPLAN: With respect to Mr. Birbano, he was also represented by Mr. Krieger at the trial and at the time of the change of plea. Mr. Fusco is here today and there has to my knowledge been no substitution of counsel.

MR. FUSCO: May I say this, Judge: My secretary made an error in the preparation of the substitution. We corrected the error, duly signed by Mr. Krieger and myself, and I think a copy was sent to the Clerk's office here.

MR. KAPLAN: Of course, it would have to

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be signed by Mr. Birbano also.

THE COURT: Is it all right, Mr. Birbano, to have Mr. Fusco represent you?

DEFENDANT BIRBANO: Yes, sir.

THE COURT: All right.

MR. FUSCO: Thank you, your Honor.

THE COURT: As to Birbano, from what I can make out in the presentence report, it seems to be your position that you are not guilty.

DEFENDANT BIRBANO: I feel that I have violated the law, but I didn't know that I was violating the law because it was done by --

THE COURT: I want to be very sure on that point.

DEFENDANT BIRBANO: I did it unintentionally but I plead guilty of having violated it.

MR. FUSCO: As I understand it, I have taken that proposition up and I knew it would disturb your Honor here this morning. And what I gather, and I gather, I take it, properly, is that the defendant was fully aware of what he was doing, and of course intended everything that he did do, but he takes the position that, with all of the awareness that he had, he wasn't certain that he was violating any particular law.

I think that is what he was intending to express in the remarks to the probation officer.

Is that correct?

DEFENDANT BIRBANO: Yes; I didn't know about the laws; that's what I wanted to say.

THE COURT: Of course, that is no excuse for violating the law, Mr. Birbano, but I certainly have taken that into consideration, and I have read over both your statement and the report of the Probation Department in this presentencing report that I have.

I want to be very sure in my own mind that while you may not have thought you were committing a crime, you did commit these acts with which you have been charged.

Of course, I did sit at the trial on the other defendants, so that I do have some knowledge about the case, and I am not approaching it as a complete stranger.

I take it then that you are prepared to have the Court pass sentence.

DEFENDANT BIRBANO: Yes, sir.

THE COURT: Is there anything that you want to say in his behalf before the Court passes

sentence?

MR. FUSCO: I think he takes the position that he would like to have me say a few brief remarks if I may.

THE COURT: All right.

MR. FUSCO: Gathering from your Honor's --

THE COURT: I am not cutting the Government off. You will have the opportunity to make a statement. I just wanted to assure myself that this was a voluntary plea.

MR. FUSCO: I was saying, Judge, gathering from your Honor's remarks in the last few minutes, I know that your Honor is fully acquainted with the report, if I can characterize it as such, but the defendant which he submitted to the Probation Department.

Of course, I know your Honor has a very full, complete and exhaustive probation report, and I know that your Honor has perused and evaluated that report very carefully and diligently in this particular matter.

I think the report will show that this defendant is fifty-nine years of age, never having been in trouble before, other than, of course, this particular

crime. He has two children, Marcello, twenty-two, and Dorothy, twenty-three, and both of the children were born in Rome.

The defendant is Jewish, his wife is Italian, and they have brought up their children in the Catholic religion, so much so, and I think the defendant, he is to be complicated for it, he changed his name from Birnbaum to Birbano so that the children wouldn't have a problem since they were being brought up as Catholics.

The report will show that the defendant was in a concentration camp for a period of time, and so much so that having been placed in a concentration camp it interrupted his medical studies, and I think he was one year short of obtaining his degree. He attended medical school both in Bologna and Chechoslovakia, and tried to resume his studies here but there were certain objections.

He picked up working as a travel agent after noticing an ad in the Progresso, an Italian newspaper, and he went to work for Mr. Vavolizza.

As he said now to your Honor, and I am inclined to agree with his thoughts, I think more or less he didn't have too much knowledge in the direction of immigration matters, and he did certain things, and I

think that these things that were done I think were done in the trade, if I can say that. Of course, he knew what he was doing, but I think he wasn't aware that it was such a practice that he would be violating. And I read part of his report, and he said in the report, and I would like to emphasize it, if I may, he says, "Since I became a citizen of the United States, I love this country and if for a moment I thought I would be violating the law, I would rather have something terrible happen to me."

This gentleman here is an intelligent human being, as it would appear from the report. He is a linguist, he is an interpreter, he is a fast typist, he speaks and understands and translates five languages. I don't have to enumerate them, I think they appear in the particular report.

He has had certain tragedies happen in the course of his life, the concentration camp for one; way back, a child that was born deformed, that eventually died. He has had certain physical ailments, hypertension and diabetes. His wife is present here in court, has recently fallen down the steps and she has a serious back injury.

He has various problems and, of course, he

has a problem here this morning on the day of judgment in this matter. He pled guilty and he threw himself at the mercy of this learned Court. He does, of course, the same here this morning.

I urge your Honor here, and before I close, I think it will appear in the probation report, that he has been working as an agent for the Aetna Life and I think they sent a rather complimentary letter stating what his efforts are with the particular company.

The wife is operating a travel agency in Paterson. I know that thought might disturb your Honor and I asked various questions in that direction. The travel agency is operated by the wife and by the son.

And before I leave the son, I think the report will show that the son did son honorably in Korea.

This travel agency, as I say, is operated by the wife and son, and the defendant for a period of time did spend a few hours, no longer.

This travel agency does not handle any immigration matters at all; they just handle pure travel work with no immigration matters.

The defendant, when he went in working as a travel agent, where the problems arose, he went in

poor. When he left Mr. Vavolizza, he left poor. He submitted to me, and I think it may be in the probation report, where he owes various sums of money, and I don't want to trouble your Honor with that. He has listed items amounting to \$9,857.98. These are moneys that are owed to various people in commitments that he must meet.

Of course, the salary that he is making for Aetna is a fairly decent salary, and I think he can properly support himself and his wife based on that salary.

I urge your Honor this morning to take into consideration the remarks I have made, providing they prove true in the probation report, and take into consideration, if your Honor will, the plea that the defendant entered admitting his culpability. And of course, also he explained here this morning what at the first blush might have appeared that he took the position that he was not guilty. That isn't so, because I think he is a little bit --

THE COURT: I think I can understand his position.

MR. FUSCO: Thank you, Judge. The defendant throws himself at the mercy of the Court, and I ask

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your Honor to be as clement as possible in this matter.

THE COURT: Mr. Birbano, do you have anything to add in addition to what your counsel has said in your behalf?

DEFENDANT BIRBANO: No, sir.

THE COURT: Or to what is contained in the material that you submitted?

DEFENDANT BIRBANO: No, sir.

THE COURT: I have given this case of yours consideration. Certainly I don't feel in the case of Mr. Birbano that we have as serious a situation involved, but I will give Mr. Kaplan an opportunity to speak on behalf of the Government, if he wishes to.

MR. KAPLAN: I have nothing to add, your Honor.

THE COURT: I see no purpose served in subjecting Birbano to confinement, so as to any jail sentence the execution will be suspended. And also in view of his situation, it would appear to me that any fine in this case would do more than hurt other people.

Accordingly, it is adjudged and decreed that the defendant is committed to the custody of the Attorney General for a term of one year; execution of sentence is suspended, and the defendant is placed on unsupervised

probation for a period of one year.

MR. FUSCO: Thank you, your Honor.

THE COURT: The sentence is on each count to run concurrently and execution is suspended.

MR. FUSCO: May I move as to the open counts that they be dismissed.

MR. KAPLAN: The Government has no objection, your Honor.

MR. FUSCO: Thank you again, your Honor.

THE COURT: Mr. Vavolizza.

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: I would suggest, in view of the letter and the position that you have taken, that possibly a motion to withdraw the guilty plea would be in order.

MR. MUCHIO: If I may add, your Honor, on that point, with the Court's permission.

THE COURT: I wouldn't be frankly confused in this regard by any sentence that was passed on Mr. Birbano.

MR. MUCHIO: I didn't hear your Honor's remarks.

THE COURT: I would not be misled or confused by the sentence I imposed on Mr. Birbano.

MR. MUCHIO: Not at all, sir, believe me. I think that your Honor knows that while the trial of the remaining defendants was in progress, I stated my position on the record.

My analysis of the case, of this particular situation, I think is most succinctly evaluated by your Honor's remark on the record when the plea was proffered, namely, that your Honor had sat in on the trial for some four or five days, and after having heard some testimony in the case -- not all of it, but sufficiently enough to at least acquaint your Honor with the true facts in the case, you felt in the circumstances that the plea was a proper one.

Now, I could understand the defendant's position being somewhat paradoxical, or the position which he indicates in that report, is a result of a great deal of emotional strain and psychological reaction to all that has happened to him in this case.

Like the other defendant, if I might add, whatever it was that constituted his involvement in the framework of this indictment, he thought was proper.

I don't believe, your Honor, even when I now discuss it with him in finality, I don't believe that he fully was aware of the full import of his acts, al-

though it was purposeful and intentional.

I think he has come to realize that now, that whatever he did was violative of the statute made and provided for in those cases. There is no question about it, your Honor. He is here ready this morning for judgment.

THE COURT: I just want to be sure, Mr. Vavolizza, that you do believe you are guilty, regardless of what my thoughts on the matter might be. That would really enter into what my reaction would be to a motion to withdraw the guilty plea.

MR. MUCHIO: Precisely, your Honor; that is all I point it out for.

THE COURT: I am not the one to pass on guilt or innocence. All I have to do, when a guilty plea is entered under the law, is to satisfy myself that there is reasonable basis for the plea.

MR. MUCHIO: Exactly.

THE COURT: And by reason of the fact that I sat on the trial of the other two defendants, I can't say that I could honestly reach a conclusion as to whether you were completely familiar with the law or not. You are supposed to know the law.

THE DEFENDANT: I did not.

THE COURT: And there is no question in my mind that for the limited purposes that we are dealing with now there is probable cause to believe that you were guilty. The jury might not, I don't know.

MR. MUCHIO: I think he fully appreciates that, Judge.

THE COURT: I think Mr. Vavolizza's situation is different the other defendant. He was the principal and the one who principally profited by it, and I have to consider whether sending this man to jail accomplishes anything.

MR. MUCHIO: Now that we have had that aspect out of the way, I can understand that your Honor has a full report, and I would indulge upon the Court to understand at least what his reactions are at this point.

I don't say that he was right. I think that he is firmly and fully convinced now that he is not right. He is not here now to plead with the Court with respect to whether or not the plea should have or should not have been accepted. We are beyond that at this stage. We are here now hoping to receive some mercy at this Court's pleasure this morning.

I point out the fact that this defendant is

a man fifty-eight years of age. He, too, like the co-defendant in this case, immigrated to this country at the age of nineteen years, and managed to get himself involved in various employments. At one time he was working in a bank as a clerk. He then also attended school for the purpose of getting instructions on insurance and became an agent. He worked at that vocation for a while and then also got a broker's license.

It is true that he was engaged in this travel business, and was engaged in this practice for some perhaps five or six years before the date set forth in the indictment.

Now, your Honor, this indictment, I need not remind your Honor, was pending for five years. Suffice to say that he is no longer engaged in that aspect of the business.

He has a family, some of the members of which are in court. He has been married to the same woman since 1941, has three children; his son Victor is presently in court, married and has a child of his own. He has a daughter who is a senior at Fordham University studying journalism. And they have a younger son fifteen years of age who is a sophomore at Fordham Prep.

There is no question in my mind that your Honor has been sorely troubled with the punishment that is to be imposed here. There is no question about it that when a man violates the law he must in a sense accept the fact that punishment can and sometimes is meted out.

I am asking your Honor that you balance your thoughts about it and consider the usefulness of this man as a citizen of the community in which he lives, and of course, the importance of this man to be at large so that he can continue to provide for his family.

Your Honor, I suggest to you that the defendant realizes now -- he is penitent -- I suggest to you that never again will he violate the laws of this jurisdiction or any other jurisdiction as far as that goes.

Now, your Honor might be concerned that perhaps the report will reflect that he is still engaged in the travel business, but principally, sir, with travel as such, which I think is basically what a travel agency should be doing.

But I think the report will also indicate that this is a man who is also an intelligent man. I am not going to say before your Honor that this man

didn't know, that he hasn't had the sufficient capacity or intelligence; on the contrary, the report will indicate that this is a man of tremendous capacity and creative ingenuity.

He has managed through the years to support his family through resolution and dedication to work, and he has enjoyed a somewhat modest financial security.

I am not suggesting to you that this man is entirely bereft of any kind of material wealth; that is not the case.

I say to your Honor, if I may only paraphrase this, that I don't believe that incarceration at this stage in life, considering all of the aspects of this case, will serve any useful purpose as far as society is concerned.

I think that this man would be best suited to maintain his position and to once again assume the role of husband and father and respectability to his family and friends. I ask your Honor for mercy, please, sir.

THE COURT: Mr. Vavolizza, is there anything you want to add to what your counsel has said?

THE DEFENDANT: No, except that if I violated the law I was never aware of it. Talking to

my counsel I believe that I have violated it.

THE COURT: Mr. Kaplan.

MR. KAPLAN: If your Honor pleases, I would like to say only this with respect to the suggestion by Mr. Vavolizza that at the time of the offenses charged he was ignorant of the law.

Your Honor will recall that at the hearing on the motion to suppress I adverted to a letter from Mr. Vavolizza in which he informed the Government that in his opinion the law was not really what it should be and precisely recommended suggestions of changing it.

In addition, over the week-end, intervening between the third day of the trial and Monday morning, at which time Mr. Vavolizza offered his plea of guilty, a tape recording of a conversation, Mr. Vavolizza had quite a lengthy one with the Chief of the New York District of Immigration and Naturalization Service, which was played for his attorney, in which there were similar remarks made.

So that the Government suggests that any protestations of ignorance of the law --

THE COURT: It wouldn't make any difference anyway. I believe that a substantial fine should be imposed here. I have reservations about committing

this man to jail. He has no prior infractions. I think the man has gone through a good deal in the past year, and I have to consider that.

Of course, I feel that this man made a substantial amount of money in this. I could fine him up to \$10,000 on each count. However, as to Count 1 I will fine him \$7,500. As to Count 2 I will sentence him to one year, suspend execution, and place him on unsupervised probation for one year.

MR. KAPLAN: Is that going to be a committed fine?

THE COURT: That will be a committed fine, but I will give him --

MR. MUCHIO: Will your Honor allow us some reasonable time?

THE COURT: Three months?

MR. MUCHIO: I think that is ample time.

THE COURT: Is that agreeable, Mr. Kaplan?

MR. KAPLAN: That would be agreeable, your Honor. That would be May 15th.

THE COURT: All right.

MR. KAPLAN: Does counsel have a motion with respect to the open counts?

MR. MUCHIO: I have a motion with respect

to the open counts that they be dismissed.

THE COURT: As to the remaining counts
they are dismissed.

MR. MUCHIO: Thank you, sir.

THE COURT: That is true also as to Mr.
Birbano.

MR. MUCHIO: Thank you again, your Honor.

- - -

I (We) hereby certify that the foregoing
is a true and accurate transcript, to the best
of my (our) skill and ability, from my (our)
stenographic notes of this proceeding.

Irving Wolfson

Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

-against-

: 63 CR. 190

SALVATORE VAVOLIZZA, et al.,
Defendants.:
-----x

MEMORANDUM

TENNEY, J.

Petitioner Salvatore Vavolizza was named in a seventy-three (73) count indictment ^{1/} returned on February 26, 1963, in which he and three other defendants were charged with making false statements to the Immigration and Naturalization Service in connection with applications for first preference immigration visas in violation of 18 U.S.C. § 1001 and with conspiracy to commit this crime in violation of 18 U.S.C. § 371. Petitioner and defendants Quartarolo and Birbano were originally represented by Otto F. Fusco, Esq., who, in turn, retained Theodore Krieger, Esq., to prepare all pretrial motions and matters preliminary to trial. On October 3, 1968, Mr. Fusco moved to withdraw from the case on the ground of personal illness and substitute Mr. Krieger as trial counsel for these three defendants. ^{2/} The motion was granted with the consent of all parties.

On October 7, 1968, Mr. Krieger advised his clients that although he was representing all of them, they were each entitled to separate counsel. However, each of them advised Mr. Krieger and the Court that they wished him to continue as their counsel. Further, the Court was assured by counsel, after its inquiry, that there existed no possibility of any conflict of interest arising from such joint representation.^{3/}

Trial commenced on Wednesday, October 9, 1968, before this Court and a jury. On Monday, October 14, 1968, during the progress of the trial, petitioner and defendant Birbano moved to withdraw their pleas of not guilty theretofore entered and substitute pleas of guilty to Counts 1 (the conspiracy count) and 10 (a substantive count) of the indictment. Both motions were granted after a voir dire examination conducted pursuant to Fed. R. Crim. P. 11 revealed to the Court's satisfaction that such pleas were entered knowingly and voluntarily, and based on the testimony elicited to date with respect to these two counts which satisfied the Court that these defendants were in fact guilty of the crimes charged.^{4/}

On October 22, 1968, a mistrial was declared as to the remaining two defendants after the jury announced that it was unable to reach a unanimous verdict.

On February 7, 1969, the day of sentencing, Mr. Severio Muchio, Esq., was substituted as petitioner's counsel. Based on a letter received by the Court from petitioner and certain statements made by petitioner to his probation officer, the Court suggested that a motion to withdraw the guilty plea might be in order. The Court emphasized that in making such determination, petitioner should not rely on the sentence previously imposed upon defendant Birbano.^{5/} Despite this suggestion, no such motion was made, although petitioner asserted that he was not aware that he was violating the immigration law when he purposefully and intentionally committed the acts charged.^{6/} The Court then imposed a \$7,500.00 fine with respect to Count 1, and a term of imprisonment of one year with respect to Count 10, execution of sentence suspended, and petitioner was placed on unsupervised probation for one year.

Petitioner now moves pursuant to 28 U.S.C. § 2255 to set aside his plea of guilty and to vacate the judgment of conviction and sentence imposed thereon.

Petitioner, placed on unsupervised probation for a period of one year, is "in custody" within the meaning of 28 U.S.C. § 2255. See United States v. Re, 372 F.2d 641, 643 (2d Cir.), cert. denied, 388 U. S. 912 (1967). Unlike a motion to "correct manifest injustice" under Rule 32(d) of the Fed. R. Crim. P., the guilt or innocence of petitioner is not controlling in an application which collaterally attacks a judgment of conviction under 28 U.S.C. § 2255. Watts v. United States, 278 F.2d 247, 250-51 (D.C. Cir. 1960).

As grounds for attacking his judgment of conviction, petitioner alleges that: 1) in accepting his plea the Court failed to comply with the "spirit, if not the letter" of Rule 11 of the Federal Rules of Criminal Procedure; 2) his counsel was enmeshed in a conflict of interest which prejudiced petitioner; and 3) his plea was not entered voluntarily, but rather was the result of his counsel's pressure.

A thorough voir dire examination was personally conducted by this Court pursuant to Fed. R. Crim. P. 11, which revealed that petitioner: 1) understood the charges which he wished to plead to; 2) conferred with counsel with respect to these charges; 3) actually committed the acts

which he was charged with; 4) had not been threatened or coerced into entering his plea, but was doing so voluntarily; 5) had not been promised that any particular sentence would be imposed by the Court if he pleaded guilty; 6) realized that the other counts of the indictment would remain open until the date set for sentencing and all that would remain for the Court to do upon its acceptance of the plea would be to impose sentence; and 7) was aware of the maximum sentence which could be imposed upon him. Additionally, the Court satisfied itself that there was a factual basis for the plea. Even if I were to assume that such an inquiry did not satisfy the mandate of the Supreme Court as set forth in McCarthy v. United States, 394 U. S. 459 (1969), that case is not applicable to pleas accepted prior to its date of decision, that is, April 2, 1969. Halliday v. United States, 394 U. S. 831 (1969).

As previously noted, Mr. Krieger, an able and experienced officer of this court, assured me that he was aware of no possibility of any conflict of interest arising from his joint representation of petitioner and defendants Quaratarolo and Birbano, and they all knowingly and voluntarily accepted the risk of sharing defense counsel. This, as was

noted in United States v. Arnone, 363 F.2d 385, 405-06 (2d Cir.), cert. denied, 385 U. S. 937 (1966), sufficiently safeguarded any rights petitioner may have had in this matter. "The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances [of which there were none present herein]." Id. at 406.

Of course, the fact that a larger fine than expected may have been imposed upon petitioner affords no grounds for setting aside the judgment of conviction and plea. United States v. Norstrand Corp., 168 F.2d 481, 482 (2d Cir. 1948); United States v. Shillitani, 16 F.R.D. 336, 339 (S.D.N.Y. 1954). Nor do petitioner's assertions that he was pressured by counsel to plead guilty require a hearing in view of the fact that such assertions were negated by his own prior declarations before this Court, United States v. Shillitani, supra at 340, and totally contradicted by the record and petitioner's conduct at sentencing.

The Government has filed a nolle prosequi as to the two co-defendants whose trial ended in a "hung jury" and declaration of mistrial. Petitioner, the principal and moving force behind this conspiracy, obviously seeks to invoke the

discretion of this Court in the expectation that the Government will not initiate further prosecution against him. I cannot allow such a result.

Accordingly, petitioner's motion is in all respects denied.

So ordered.

Dated: New York, New York.

October 16, 1969.

CHARLES H. TENNEY
U.S.D.J.

United States of America
-against-
Salvatore Vavolizza, et al., Defendants.

63 CR. 190

FOOTNOTES

- 1/. Pg. 1. 63 Cr. 190.
- 2/. Pg. 1. Attached to Government's Affidavit in Opposition as Exh. A.
- 3/. Pg. 2. Attached to Government's Affidavit in Opposition as Exh. A-1.
- 4/. Pg. 2. Attached to Government's Affidavit in Opposition as Exh. B.
- 5/. Pg. 3. Birbano was committed to the custody of the Attorney General for a term of one year; execution of sentence was suspended, and defendant was placed on unsupervised probation for a period of one year. No fine was imposed.
- 6/. Pg. 3. Attached to Government's Affidavit in Opposition as Exh. C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

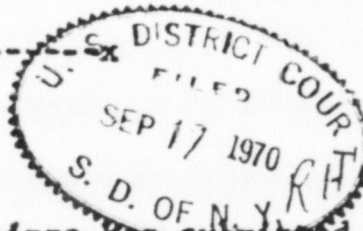
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UNITED STATES OF AMERICA

-against-

SALVATORE VAVOLIZZA, et al.,
Defendants.

:
: 63 CR. 190
: MEMORANDUM

TENNEY, J.



Defendant Salvatore Vavolizza has submitted a letter and numerous other papers and documents, ostensibly in support of a pro-se motion seeking an ex parte order permitting him to withdraw his plea of guilty heretofore accepted by this Court on October 14, 1968.

Without considering the timeliness of the motion or the particular statute, 28 U.S.C. § 2255, or rule, Fed. R. Crim. P. 32(d), appropriate thereto, the Court denies the motion for the reasons stated in United States v. Vavolizza, 63 Cr. 190 (S.D.N.Y., filed Oct. 16, 1969), aff'd in open court. (March 23, 1970), cert. denied, 398 U. S. 950 (1970), wherein defendant's similar motion pursuant to 28 U.S.C. § 2255 was also denied.

So ordered.

Dated: New York, N. Y.
September 17, 1970.

Charles J. Tenney
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
 UNITED STATES OF AMERICA :
 -against- : 63 Cr. 190 (CHT)
 SALVATORE VAVOLIZZA, :
 Defendant. : MEMORANDUM
 -----x

TENNEY, J.

Defendant, who pled guilty to two counts of a 73-count indictment, 63 Cr. 190, on October 14, 1968, has moved pursuant to Fed. R. Crim. P. 32(d) to set aside the judgment of conviction and permit him to withdraw his plea of guilty. He also asks that this Court recuse itself from considering the instant motion on the ground that the Court's involvement with this case and its previous decisions make it virtually impossible for him to obtain a fair hearing.

Though in different form--defendant is moving pursuant to Fed. R. Crim. P. 32(d)--the instant motion raises the same issues as were raised in an earlier motion made pursuant to 28 U.S.C. § 2252 (filed on August 11, 1969) and a subsequent motion, made pro se (filed in September 1970). The 2252 motion was denied by this Court in an opinion, United States of America v. Salvatore Vavolizza, et al., 63 Cr. 190 (S.D.N.Y., Oct. 16, 1969), and was affirmed in open court by the United States Court of Appeals for the Second Circuit on February 25, 1970. Defendant's

petition for a writ of certiorari from that affirmance was denied in June 1970, 398 U.S. 958 (1970). Similarly, his pro se motion was denied by this Court on September 17, 1970.

Since this Court's previous determination of the issues raised here was affirmed on appeal, there is no reason why this Court should recuse itself. Additionally, defendant has raised no new issue which would suggest that its previous decision was incorrect.

Accordingly, the instant motion is denied in all respects and the Court adheres to its previous decisions in this matter.

So ordered.

Dated: New York, New York

March 10, 1975

CHARLES H. TENNEY

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

-against- :

63 Cr. 190 (CHT)

SALVATORE VAVOLIZZA, :

Defendant. : MEMORANDUM
-----X

TENNEY, J.

Defendant's attorney, by letter dated May 19, 1975, has asked the Court to reconsider its decision of March 10, 1975 in light of the affidavit of Saverio A. Muschio, defendant's attorney at the time defendant entered a plea of guilty. The letter shall be construed as a motion for reargument, even though the motion is untimely. Rule 9(m), General Rules of the United States District Courts for the Southern District of New York.

After having reviewed Mr. Muschio's affidavit, my previous decisions in this matter, and all of the papers submitted by this defendant on his previous motion, I adhere to my previous decisions.

Accordingly, the instant motion for reargument is denied in all respects.

So ordered.

Dated: New York, New York

May 22, 1975

CHARLES H. TENNEY

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

AFFIDAVIT

SALVATORE VAVOLIZZA and MARTIN
BIRBANO,

63 Cr. 190

Defendants.

SAVERIO A. MUSCHIO, being duly sworn, deposes and says:

That I was retained by the defendant SALVATORE VAVOLIZZA for the purpose of determining the advisability of a motion to withdraw the plea of guilty which was entered by him in the above entitled matter on or about October 14, 1968; and

that I obtained a copy of the plea minutes and after reading and studying the plea minutes, it was my judgment that a motion to withdraw the guilty plea would be denied; and at that time I advised the defendant that the more prudent course to take would be to plead for mercy at the time of sentencing which had been scheduled for February 7, 1969.

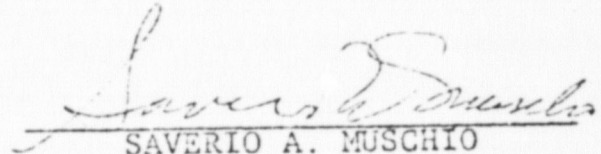
That it is my recollection that when I met Mr. Vavolizza in Court on February 7, 1969, he mentioned again his desire to have the guilty plea withdrawn; since I felt the Court, in all probability, would deny the same, I once again suggested to the defendant that we ought to proceed with the sentence. That on the day of sentencing, to wit February 7, 1969, Judge Charles H. Tenney imposed a fine of \$7,500.00 on one count to which the defendant pled guilty and suspended a sentence of one year and placed him on unsupervised probation for one year concerning his guilty plea to the second count.

A reading of the sentence minutes reflects that Judge Tenney suggested the possibility of a motion to withdraw the guilty plea based upon a letter addressed to the Court by Mr. Vavolizza.

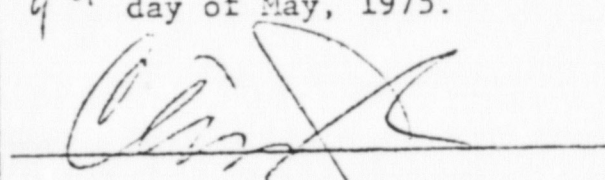
That, however, I proceeded and made a plea for leniency on behalf of Mr. Vavolizza. That thereafter on or about June 30, 1969, I received a letter from the defendant Vavolizza in which he advised me that at the time of sentence he did not hear the judge make any reference to a motion to withdraw his guilty plea; and that he was only aware of this suggestion by the Court after he had read a transcript of the plea minutes, some time prior to June 30, 1969.

That I cannot say whether or not the defendant Vavolizza heard the Court's remarks. I did not discuss with him anything further concerning the motion to withdraw the guilty plea while we stood before Judge Tenney on the date of sentence.

Dated: New York, New York
May 9, 1975


SAVERIO A. MUSCHIO

Sworn to before me this
9th day of May, 1975.


CLIFFORD J. CHU
Notary Public, State of New York
No. 44-0625600
Qualified in Rockland County
Term Expires 12/31/77

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - -x
4 UNITED STATES OF AMERICA, :
5 :
6 vs. : 63 Cr. 190
7 :
8 SALVATORE VALVOLIZZA, :
9 :
10 Defendant. :
11 - - - - -x

12 BEFORE: HON: CHARLES H. TENNEY, D. J.

13 September 1, 1976
14 Room 318

15 APPEARANCES:

16 ROBERT FISKE, JR., ESQ.,
17 United States Attorney
18 For the Government
19 BY: DOMINIC F. AMOROSA, ESQ.,
20 Assistant United States Attorney

21 GINO E. GALLINA, ESQ.,
22 For the Defendant
23 BY: JOEL A. BRENNER, ESQ., Of Counsel
24
25

bjcq

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MR. AMOROSA: The government is ready.

MR. BRENNER: Good morning, your Honor. I am Joel Brenner. I am of counsel to Gino Gallina who represents Salvatore Valvolizza on this motion.

This is a motion purusant to Rule 32 D to withdraw a guilty plea on the grounds of manifest injustice. I would like to go into the background and then explain the legal issues we are raising.

Your Honor knows, since we had this case several years ago, Mr. Valvolizza pled guilty in 1969, I believe it was, and the guilty plea proceeding was rather brief and to the point. Seven or eight or ten consecutive pages of a 27 page 128 page indictment read to Mr. Valvolizza and he was asked, "Do you admit that you committed these acts and plead guilty?" He said, "Yes." That was his total contribution to the plea hearing. Immediately upon leaving the courtroom he went to the probation department and at that point he insisted he was innocent and not guilty. He subsequently memorialized this assertion in a letter to the probation department. He also fired his then attorney and retained new counsel for the precise purpose of moving before your Honor to withdraw that plea of guilty.

At the time of sentence your Honor made several

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statements which indicated that you yourself had some doubt as to whether or not there was a factual basis for the plea or whether or not for whatever reason --

THE COURT: No, no, not a factual basis of the plea, but whether or not he knew he violated the law.

That is not the same thing.

MR. BRENNER: The intention, your Honor.

THE COURT: Let's not go astray on that. I had already sat through several days of the trial. I don't know how you can be in a better position to know the valid basis for the plea when you have heard the evidence.

MR. BRENNER: I meant that there was a question as to Mr. Valvolizza's intent, a legal element, if you will, of the particular crime.

THE COURT: There was evidence that Mr. Valvolizza knew precisely what the law was but he did not agree with that law and still he chose to violate it.

MR. BRENNER: That was not before the court at the plea or at the time of sentence. I would point out that the government did nolle the case against the two co-defendants and apparently whatever proof there was was not that overwhelming. In other words, the jury could not agree and there was an acquittal and the case was ultimately nolle, but at the time of sentence your Honor made several remarks

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which I think are significant.

You said to Mr. Valvolizza, "I would suggest in view of the letter and position you have taken that possibly a motion to withdraw the guilty plea would be in order."

On page 11 of the sentence minutes. Mr. Valvolizza significantly did not reply at that point. In his affidavit he said, "I did not hear your Honor make that statement to me."

In a previous affidavit he did substantiate his hearing difficulties with letters from doctors.

At that point the attorney who he swears he specifically retained to withdraw the plea does not act on that. Instead he leads your Honor to believe that that is not going to happen, that Mr. Valvolizza is going to throw himself on your Honor's mercy and a certain amount of discussion about whether or not Mr. Valvolizza did these things intentionally or purposely. Again your Honor said, "I want to be sure, Mr. Valvolizza, that you believe you are guilty regardless of my thoughts on the matter. That would really inter into a motion to withdraw the guilty plea."

Again, invited your Honor's attention to the minutes, Mr. Valvolizza does not reply. Instead Mr. Muccio once again subverts the intention of your Honor and he responds, "We don't want to do that. That wasn't our

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2 intention."

3 THE COURT: And he did not hear his attorney say
4 that?

5 MR. BRENNER: According to him he did not.
6 He knew he retained this man specifically to make a motion
7 to withdraw the plea. He says that on the morning of the
8 sentence for the first time, contrary to Mr. Muccio's
9 affidavit, Mr. Muccio said, "Maybe you ought to throw your-
10 self on the mercy of the court." Mr. Valvolizza's sworn
11 affidavit was, "I refuse." He said, "I told him to go
12 ahead and make the motion."

13 He was led to believe by Mr. Muccio's silence
14 that Mr. Muccio would do that.

15 Your Honor says on the bottom of page 13,
16 "I can't say I can honestly reach a conclusion as to whether
17 you are completely familiar with the law or not. You are
18 supposed to know the law." At that point Mr. Valvolizza
19 speaks and he said, "I did not."

20 Now, the point that I am trying to make here is
21 that the issue of willfulness and the issue of knowledge,
22 especially when you are dealing with something like the
23 immigration and naturalization laws, is not a cut and dried
24 matter. The Supreme Court and the Circuit have spoken to
25 the matter of how complicated willful and knowledge -- how

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difficult it is to prove willfulness and knowledge in these cases because the cases hold that there must be proof of an evil knowledge.

THE COURT: I find that there was an evil motive. It is quite clear from your own papers. After his counsel had spoken on the matter of the sentence, I said to him, and I am reading from page 17 of the transcript, "Is there anything you want to add to what your counsel has said?"

The Defendant, "No, except if I violated the law, I never was aware of it. Talking to my counsel I believe that I have violated it." Mr. Kaplan, the Assistant U. S. Attorney, "If your Honor pleases, I would like to say only this with respect to the suggestion by Mr. Valvolizza that at the time of the offense charged he was ignorant of the law. Your Honor will recall that on the hearing on the motion to suppress I averted to a letter from Mr. Valvolizza in which he informed the government that in his opinion the law was not really what it should be and precisely recommended suggestions of changing it."

At which time Mr. Valvolizza offered his plea of guilty and a tape recording was made of a conversation that Mr. Valvolizza had which was quite a lengthy one with the chief of the New York District of Immigration and Naturalization Service in which there were similar remarks

made.

MR. BRENNER: I agree, your Honor.

THE COURT: So that was all before me at the time the hearing was held. I will tell you that if I had Mr. Valvolizza before me now, he would get a good deal more than a fine.

MR. BRENNER: Your Honor, I can only respond to that by saying that I still believe that there is an open question here. Mr. Kaplan who was appearing for the government stated his believe that there was the deliberate and willful violation of the law and Mr. Valvolizza said, "I don't think that's what happened."

Your Honor indicated that you were not sure whether a jury would find him guilty.

Our point is not that he is guilty or not guilty, but that there is an open issue.

THE COURT: The issue has been closed. It has been closed for years.

MR. BRENNER: Are you saying that because of the prior motions made --

THE COURT: Not only on the prior motions that have been made to which there was such a finding, but on the basis of the very record that you present to the court.

The things are taken out of context. That is one

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1 thing. But, if you read the entire record, this record
2 has been before the Appellate Court and they did not even
3 waste time writing an opinion. It has been not even short
4 shrift from the Supreme Court.
5

6 MR. BRENNER: Let me address myself to the
7 prior motions. It is my understanding that nowhere in the
8 prior motions was an attack made on that aspect of the
9 plea proceeding that we are now referring to which is
10 whether or not there was a sufficient basis to show that
11 he acted knowingly and willfully.

12 THE COURT: I had heard the evidence in the
13 case. I had heard three days of evidence. I so stated
14 that.

15 MR. BRENNER: I know your Honor did make a
16 finding. Your Honor has made that finding on prior motions.
17 I don't believe that was in response to a specific attack
18 on the legal element of knowledge and willfulness, but
19 an omnibus, an act on the plea proceeding based on coercion
20 and things like that. We are alleging a very, very narrow
21 issue of law and based on that, even though your Honor sat
22 for three days on trial, I would remind your Honor again
23 that none of the defendants in this case were convicted.
24 I believe they were acquitted and the case nolle and that
25 which your Honor was relying on the trial testimony was not

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conclusive as to issues of guilt or innocence.

THE COURT: Mr. Berbano was convicted.

MR. BRENNER: I believe he pled guilty.

THE COURT: He pled guilty.

MR. BRENNER: That has nothing to do with Mr. Valvolizza's knowledge or willfulness. It is not whether he did the acts. It the mental state in which he was in when he did them.

THE COURT: The only possible question of knowledge that is involved here is whether he knew he was committing a crime and that violating a statute, but as long as he did the acts that he did do willfully and knowingly and on the record he knew what this statute was. I think every element of willfulness and intent that you can possibly have is established.

It just amazes me that this man cannot get it through his head that here we have a situation in the country and state that we are flooded with illegal immigrants who are taking employment away from legal immigrants and citizens and Mr. Valvolizza was part of a conspiracy to just accomplish exactly that.

Let me tell you that if anybody came charged as he was charged before me, he would not have gotten just a fine, but a substantial period of imprisonment.

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MR. BRENNER: Mr. Valvolizza did receive a fine some seven or eight years ago.

THE COURT: And that was because of his age and I so stated that I suspended the imposition of the prison sentence.

MR. BRENNER: All he did recieve was a fine. He has paid that fine and he is suffering no loss of benefit from the fact that he has a conviction. Nonetheless, he has insisted over and over and over again that he is not, in fact, guilty, and he continues to attempt to have his day in court.

THE COURT: I suppose he wants he fine back too?

MR. BRENNER: He has agreed that if the fine is ever recovered, it will be given to charity.

THE COURT: I prefer having it going to the government.

MR. BRENNER: I understand your Honor's position. I am amazed at the tenacity of Mr. Valvolizza. I believe there is something behind it.

THE COURT: If I can impose costs and attorneys' fees in the matter, I would certainly do it because it is an imposition on the court and an imposition on the government to make these continued motions which are repetitive in

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2 my opinion and to the extent that they are not repetitive,
3 and I do not agree that they are not repetitive, but they
4 merely -- it is something that he has dreamed up for new
5 motions and he has had his day in court. I have not the
6 slightest inclination to grant this motion.

7 MR. BRENNER: Your Honor, may I address myself
8 to one point which I don't believe has been raised before
9 and that has to do with the actions of Mr. Muccio. I think
10 it is quite clear that at the time of sentence had Mr.
11 Valvolizza or his attorney made a motion to withdraw the
12 plea and had they stated, "Mr. Valvolizza does not believe
13 that he intentionally committed any acts," I believe, based
14 on my reading of this, that your Honor would entertain that
15 motion and have acted favorably on that.

3 16 THE COURT: We will set that at rest because
17 I do not believe I would have.

18 MR. BRENNER: Your Honor stated that if Mr.
19 Valvolizza did not believe he was guilty that that would
20 be received favorably. I thought it was significant.
21 "I want to be sure, Mr. Valvolizza, you do believe you are
22 guilty. That would really enter into what my reaction
23 would be."

24 THE COURT: That would enter into it.

25 MR. BRENNER: I don't think that your Honor

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2 would have made that statement --

3 THE COURT: This situation is perfectly clear.
4 Mr. Valvolizza found that his co-defendants -- that the
5 government decided not to go ahead and retry them and he
6 is now attacking attorneys.

7 He has no sympathy from me. You can pass
8 word to him that he is very lucky that he was sentenced
9 when he was and my remarks about illegal aliens taking
10 work away from legal aliens and American citizens.

11 MR. BRENNER: With all due respect, your Honor,
12 I don't believe that you really can or it is inferable
13 from this record that Mr. Valvolizza is attempting to make
14 use of the fact that the co-defendants were acquitted.
15 He asserted his innocence after he pled guilty and when
16 his co-defendants were still on trial.

17 THE COURT: He was then given an opportunity
18 to withdraw his plea.

19 MR. BRENNER: Which he claims he never heard.
20 He says, he swears that he retained Mr. Muccio specifically
21 to make the motion to withdraw the guilty plea and Mr.
22 Muccio agrees. Where they part company is whether Mr.
23 Muccio was able to talk Mr. Valvolizza out of it.
24 I think that is a deprivation of a constitutional right.

25 THE COURT: When the court addressed Mr.

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2 Valvolizza, he responded.

3 MR. BRENNER: Several times he did not, your
4 Honor. At that specific statement --

5 THE COURT: Once. Is that several times?
6 Once.

7 MR. BRENNER: I would say more than once in the
8 record, your Honor.

9 THE COURT: Try to stick with the record. There
10 is no indication that he had any trouble with his hearing.
11 There was no statement ever made that he had trouble with
12 his hearing.

13 There was no request of anybody to speak louder.

14 MR. BRENNER: There was by Mr. Muccio.

15 THE COURT: His attorney made many statements.
16 He only had to hear a portion of it for him to know his
17 attorney was not asking to withdraw the guilty plea.

18 The attorney was speaking on his behalf in
19 connection with the sentence. You mean to say that he did
20 not hear any of that?

21 MR. BRENNER: According to his affidavit he did
22 not.

23 THE COURT: It is unbelievable. It is incredible.

24 MR. BRENNER: I think if I can shift my
25 emphasis.

The third or last point in the papers was that I believe that these matters should be resolved once and for all at a hearing.

You say that Mr. Valvolizza has had his day in court. Most respectfully I disagree. He has never been on the witness stand or told his story. He has said maybe a total of 15 or 20 words during the entire plea and sentence proceeding. I don't think he has had his day in court.

THE COURT: The motion for a hearing is denied. You have your Appellate remedies if you want it. I do not need to hear from the government.

MR. AMOROSA: Judge, you have adequately covered the merits and we agree with your Honor. We would like your Honor to make a finding which you, of course, alluded to in your remarks that the principles of res judicata and collateral estoppel also apply here.

THE COURT: Right. I intend to endorse on the back of the papers in all respects.

MR. BRENNER: Thank you, Judge.

MR. AMOROSA: Thank you, your Honor.

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